

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	Docket No. 96-45
Federal-State Joint Board on)	
Universal Service)	DA 03-4113
)	
NPCR, INC. d/b/a NEXTEL PARTNERS)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the State of Florida)	
_____)	

**REPLY COMMENTS OF
NEXTEL PARTNERS**

NPCR, INC. d/b/a NEXTEL PARTNERS

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SUMMARY

Nextel Partners has demonstrated in its Petition for Designation that it meets all of the statutory criteria for designation as an Eligible Telecommunications Carrier (“ETC”) and that it provides, or will provide upon designation all of the “supported services” required by the Commission’s Rules throughout its designated service area. Nextel Partners has also shown that a grant of its Petition is in the public interest for the affected rural telephone company (“RTC”) study areas, because it would result in the benefits of additional competition, greater mobility, access to wireless emergency services, innovative services and technology and enhanced choice for consumers in those RTC study areas.

The commenters in this proceeding do not dispute that Nextel Partners will offer and advertise the Universal Service Fund (“USF”) supported services throughout its designated area. Nor do the commenters present any evidence that the public interest will not benefit from granting Nextel Partners ETC status, or that rural consumers will be harmed by a grant of the Petition. For example, it has not been shown that grant of Nextel Partners’ Petition will have any appreciable affect on the size of the USF.

Many of the issues addressed by the commenters are larger questions of national policy that exceed the scope of this proceeding, which is solely concerned with Nextel Partners’ eligibility for ETC status in Florida. The commenters have not provided evidence to support their overarching policy concerns, and in any event are not entitled to have these issues addressed in this proceeding. Nor do the policy issues discussed by the commenters merit a stay of this proceeding, or the imposition of any further delay in granting Nextel Partners ETC status in Florida. The Commission must address Nextel Partners’ Petition based on existing law and

precedent. Nextel Partners understands that it, along with all other designated ETCs, will be subject to any changes affecting ETCs that may be promulgated in the future.

In sum, nothing submitted by any commenter in this proceeding has refuted or meaningfully called into question any of the substantive showings made by Nextel Partners in its Petition for Designation. Accordingly, Nextel Partners requests that the Commission grant its Petition without further delay.

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NPCR, Inc. d/b/a Nextel Partners (“Nextel Partners”), by its undersigned counsel hereby submits its “Reply Comments” in the above-captioned proceeding in response to comments filed by Fred Williamson & Associates, Inc. (“FWA”), the National Association of State Utility Consumer Advocates (“NASUCA”), the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) , TDS Telecommunications, Inc. *et al.* (“TDS”) and the late-filed comments submitted by Verizon (collectively, the “Commenters”).¹

Nextel Partners’ September 16, 2003 Petition for Designation (the “Petition”) as an Eligible Telecommunications Carrier (“ETC”) in the State of Florida demonstrated that Nextel Partners meets all of the statutory criteria for designation as an ETC and

¹ See Public Notice, *Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida*, CC Docket No. 96-45, DA 03-4113 (rel. December 30, 2003). Comments on Nextel Partners’ Petition were due to be filed on February 2, 2004. See Nextel Partners, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, 69 Fed. Reg. 3145 (January 22, 2004). Verizon’s late-filed comments were submitted on February 3, 2004.

provides, or upon designation will provide, in the Designated Areas² of the State of Florida all of the services and functionalities required of an ETC pursuant to applicable law. Moreover, Nextel Partners demonstrated in its Petition that the public interest would be served by designating Nextel Partners as an ETC, and that the public will not be harmed as a result of the grant of Nextel Partners' Petition.³

The Commenters raise a variety of issues, none of which constitutes any legal, factual or policy basis for the denial of Nextel Partners' ETC status. Accordingly, the Commission should grant Nextel Partners ETC status in the Designated Areas of the State of Florida without further delay.

A. The Commenters Fail to Address the Substantive Merits of Nextel Partners' Petition for Designation

None of the Commenters disputes Nextel Partners' showing that it meets all of the statutory criteria for designation as an ETC, or that Nextel Partners will offer and advertise all of the USF supported services throughout its designated area. Nor has any Commenter refuted the clear benefits to the public interest and the citizens of rural Florida that Nextel Partners has outlined in its Petition, or shown why the grant of Nextel Partners' Petition will cause harm to the public.

² In its Petition, Nextel Partners refers to the non-rural ILEC wire centers and rural telephone company ("RTC") study areas in which it seeks ETC status as the "Designated Areas."

³ See, e.g., *In the Matter of Federal-State Joint Board on Universal Service: Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) ("*Virginia Cellular*") at ¶ 26 *et seq.* In *Virginia Cellular*, the Commission established a new "balancing test" for the public interest analysis, which considers "whether the benefits of an additional ETC . . . outweigh any potential harms." *Virginia Cellular* at ¶ 28.

For example, OPASTCO broadly asserts that Nextel Partners' Petition "is based entirely on vague generalities regarding the generic benefits of competition."⁴ OPASTCO, however, provides no empirical evidence to refute the showings of specific benefits to the public made by Nextel Partners in its Petition, including the advantages of mobility, a larger local calling area than the incumbent carrier and (where requested by the PSAP) GPS location assistance for customers calling 911.⁵ Likewise, TDS provides no empirical evidence to refute Nextel Partners' showings, despite TDS' attempt to argue that Nextel Partners has not made a sufficient showing.

FWA does not even attempt to contend that Nextel Partners' Petition fails to satisfy the requirements of Section 214 of the Act for designation as an ETC. In fact, FWA freely admits in its comments that Nextel Partners' Petition satisfies most of additional public interest criteria elaborated by the Commission in its recent *Virginia Cellular* decision and notes that application of the analysis in *Virginia Cellular* could result in approval of Nextel Partners' petition.⁶ FWA's position is that the Commission's public interest analysis in *Virginia Cellular* is "incomplete" and should include other burdensome requirements that would result in the denial of Nextel Partners' Petition.⁷ The other two remaining Commenters (NASUCA and Verizon) do not even address the merits of Nextel Partners' Petition.

⁴ OPASTCO Comments at 5.

⁵ See Nextel Partners' Petition at 7-8

⁶ See, e.g., FWA Comments at 3.

⁷ See *id.* at 3 and 12-19.

B. Designation of Nextel Partners as an ETC is in the Public Interest

The record in this proceeding clearly demonstrates that Nextel Partners' designation as an ETC will benefit Florida telecommunications users. These consumers are the focus of the goals of Universal Service.⁸ Under the Commission's Universal Service policies, consumers residing in high cost areas and low income consumers in the State of Florida should be afforded the same opportunities as other consumers to choose a telecommunications carrier, to access new technologies, realize the benefits of mobility and access to wireless emergency services and to select from a menu of innovative services.⁹

Wireless carriers such as Nextel Partners add the element of mobility to the provision of Universal Service Fund ("USF") supported services -- a valuable option that the incumbent wireline LEC cannot match. This essential difference is particularly beneficial to consumers in rural areas, including remote roads and highways, where wireline telephones are more widely spaced than in concentrated urban areas. As the Commission emphasizes in its recent *Virginia Cellular* decision:

. . . the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the

⁸ See *Alenco Communications Inc. et al. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("*Alenco Communications*").

⁹ See *Virginia Cellular* at ¶¶ 12 and 29 and Separate Statement of Chairman Michael K. Powell at ¶ 1 ("we recognize the unique value that mobile services provide to rural consumers by giving added substance to the public interest standard by which we evaluate wireless eligible telecommunications carriers.") See also *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 at ¶¶ 4, 21 (1997) ("Universal Service Order"). See also *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214 (e) and PUC SUBST. R. 26.418*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168 (Texas Public Utility Commission, October 30, 2000) ("*Texas PUC Order*") at 2.

availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.¹⁰

In addition, Nextel Partners typically offers a much larger local calling area than the RTCs it competes with, and this is a significant benefit to consumers. The local calling area for all Nextel Partners customers in Florida includes *all of the State of Florida*, as well as the southern half of the State of Alabama and the gulf coast of the State of Mississippi.¹¹ All of the foregoing benefits are in the public interest and advance the goals of Universal Service.¹²

The Florida public's urgent need for reliable, ubiquitous wireless telecommunications both in urban and rural areas is emphatically underscored by the contents of letters sent recently by three prominent members of the Florida House of Representatives to Chairman Lila Jaber of the Florida Public Service Commission ("FPSC").¹³ For example, Representative Donald Brown's letter states, in pertinent part:

I represent five rural counties in Northwest Florida. Economic development in rural areas is paramount to Florida's economic success.

* * * *

It is hard to imagine conducting business or utilizing emergency services without the use of the wireless telephone. It truly has become an extension of our lives. In fact, more and more Floridians choose a wireless phone as their only phone.

¹⁰ *Virginia Cellular* at ¶ 29.

¹¹ See Nextel Partners' local calling area map for the State of Florida, attached as **"Exhibit 1"** hereto. Moreover, unlike some other wireless carriers, Nextel Partners does not impose any "roaming" charges for the use of its nationwide service. See *Virginia Cellular* at ¶ 29.

¹² See, e.g., RCC Order at ¶¶ 23-24.

¹³ See January 30, 2004 Notice of Ex Parte contact submitted to the FCC in CC Docket 96-45 by the Public Service Commission of the State of Florida, with attached letters from Representatives Donna Clarke (District 69), Larry Cretul (District 22) and Donald D. Brown (District 5) of the Florida House of Representatives.

Everyone realizes that building and maintaining a wireless network in rural areas is much more expensive than in the urban centers of our state. That is why it is important that wireless carriers have fair access to money collected by Universal Service Fund fees.¹⁴

Representative Donna Clarke's letter states that, "The wireless telephone has become an extension of people's lives – whether they live in Miami, Pensacola, or a town in between," and urges the FPSC to "make sure wireless telecommunications services are affordable and widely available throughout the state."¹⁵ Representative Clarke states further that "[t]he FCC, Joint Board and state regulatory panels such as the Florida Public Service Commission need to make sure arbitrary obstacles aren't thrown in the path of upgrading and building out wireless networks in rural areas."¹⁶ With regard to the importance of wireless service to emergency communications, Representative Clarke observes:

Certainly one of the foremost lessons from the tragedy of September 11th is the importance of communications at a time of emergency. Whether it is a threat on our security or a severe hurricane, wireless communications is vital to law enforcement, emergency crews and individuals.

These letters from elected members of the Florida House of Representatives address the pressing need of Florida citizens for USF supported services offered over wireless systems, and demonstrate that grant of Nextel Partners' ETC petition in Florida will serve the public interest. Nextel Partners proposes to provide wireless Universal Service supported services to consumers in both non-rural and rural areas in the State of Florida, directly addressing not only the public interest standards enunciated by the

¹⁴ Brown Letter at 1-2.

¹⁵ Clarke Letter at 1.

¹⁶ *Id.*

Commission, but also the concerns voiced by Florida lawmakers. Accordingly, as established in Nextel Partners' Petition for Designation, Nextel Partners' designation as an ETC in the Designated Areas would unquestionably serve the interest of the public in the State of Florida.¹⁷

1. FWA's Contentions

FWA acknowledges in its comments that it does not represent the interests of any citizens or providers in the State of Florida. FWA states it "is a consulting firm located in Tulsa, Oklahoma that represents small rural Incumbent Local Exchange Carriers (ILECs) that operate in Kansas and Oklahoma."¹⁸ Thus, FWA admits that its *only* interest in this proceeding is that "a decision in this proceeding, like the Virginia Cellular proceeding, could affect pending ETC cases in [Kansas and Oklahoma]."¹⁹ Unlike the *ex parte* comments from elected members of the Florida House of Representatives, FWA's comments in this proceeding are *not* directed at protecting the public interest concerns and needs of the citizens of rural Florida.

As noted above, FWA contends that Nextel Partners' Petition should be denied, but at the same time FWA essentially admits that the application of the Commission's analysis in *Virginia Cellular* could result in a grant of Nextel Partners' Petition. FWA's principal argument is that the Commission's newly-enunciated public interest analysis is not stringent enough, and that additional burdensome requirements should be applied so as to result in a denial of Nextel Partners' Petition. Oddly, although FWA claims in its

¹⁷ See, e.g., *Western Wireless Wyoming Order* at ¶15 ("[d]esignation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.").

¹⁸ FWA Comments at 2.

¹⁹ *Id.*

caption on page 8 of its comments that the application of the Commission's public interest analysis in *Virginia Cellular* "demonstrates that Nextel's ETC petition should be denied," the actual text of FWA's comments substantially contradicts this conclusion. For example, in addressing the Commission's criterion of increased competitive choice to consumers, FWA admits "[i]f the Commission's rather minimal *Virginia Cellular* test is applied, *Nextel does provide a choice of providers.*"²⁰ Similarly, with regard to the question of whether a grant of Nextel Partners' Petition would constitute an undue burden on the Universal Service Fund, FWA states:

The Commission in *Virginia Cellular* concluded that the designation of *Virginia Cellular* would not dramatically burden the fund. If each ETC petition is viewed in isolation, and if a needs test is not applied, the same flawed rationale and incomplete analysis can be applied to the Nextel Petition.²¹

In regard to the Commission's requirement that a competitive ETC petitioner demonstrate the unique advantages of its service offerings, FWA allows that Nextel "has larger calling scopes," "provides mobility," "provides access to basic and emergency services," and "offers a variety of local usage plans."²² In fact, of all of the public interest issues enunciated by the Commission in the *Virginia Cellular* Order, FWA only attempts to challenge Nextel Partners with respect to *two*, viz.: (i) Nextel Partners' commitment to providing quality telephone services;²³ and (ii) Nextel Partners' showing with regard to its ability to "satisfy its obligation to serve the designated service areas

²⁰ FWA Comments at 8 (emphasis supplied).

²¹ *Id.* at 9.

²² *Id.*

²³ See, e.g., *Virginia Cellular* at ¶ 28; FWA Comments at 10.

within a reasonable time frame.”²⁴ Neither of these challenges seriously calls into question the manifold benefits Nextel Partners brings to the public in Florida. Nextel Partners certainly is committed to and does provide quality telephone services and has already stated that if designated it will satisfy its obligations to serve the designated areas. FWA submits *no* credible evidence to demonstrate otherwise.

FWA criticizes the statements concerning the inherent characteristics of wireless radiotelephony set forth in footnote 8 of Nextel Partners’ Petition, asserting that it is “Nextel’s oblique way of saying that it has dead spots and areas of poor coverage in the area for which it seeks ETC designation.”²⁵ Based on FWA’s unsupported contention that Nextel Partners has such dead spots or poor coverage, FWA then complains that Nextel Partners has not offered a specific commitment to improve or build additional facilities “to alleviate these problems.”²⁶ FWA’s argument, however, is based on mere speculation: footnote 8 of Nextel Partners’ petition was not a disguised admission of any “dead spots” or “areas of poor coverage” in its Designated Areas, and the notion that Nextel Partners needs to make additional commitments to “alleviate” a “problem” that has not been demonstrated to exist is gratuitous. The footnote in Nextel Partners’ Petition merely clarified what is already well-known: wireless radiotelephony is subject to geographic, atmospheric, man-made radiofrequency and physical structure interference issues.²⁷ Nextel Partners is aware of this phenomenon and addresses it in its system

²⁴ *Id.*

²⁵ FWA Comments at 9.

²⁶ *Id.*

²⁷ In fact, in *Virginia Cellular*, the Commission expressly stated that its rules “acknowledge the existence of dead spots,” and that the possibility of dead spots did not

design and operation and service to customers. Certainly, Nextel Partners' customer base would not have grown to more than 1,000,000 subscriber lines since Nextel Partners' inception in 1999, if Nextel Partners were not able to provide quality, reliable service.

In the *Virginia Cellular* Order, the Commission acknowledged and accepted certain additional commitments made by Virginia Cellular in response to specific allegations made by a number of Virginia rural telephone companies that Virginia Cellular's service was subject to dropoffs and poor coverage.²⁸ In their comments, the Virginia Rural Telephone Companies claimed generally that

wireless signals are sporadic in mountainous regions such as the area served by Virginia Cellular. Signals can be unavailable to whole sections of a community because of the terrain.²⁹

More specifically, Highland Telephone Cooperative stated that "Virginia Cellular provides coverage – with known dead spots – to only a quarter of Highland's service area."³⁰ MGW Telephone Company similarly contended:

Wireless signals do not reach many of the areas that MGW serves in Highland and Augusta counties. *The mountainous terrain makes it very difficult to achieve effective wireless coverage.* The fact that MGW Telephone's entire service area is a "Quiet Zone" makes coverage significantly more challenging because of reduced signal level requirements."³¹

Thus, the additional service quality commitments made by Virginia Cellular to the Commission were made in response to *very specific allegations* by rural telephone

demonstrate that Virginia Cellular was not willing or capable of providing "acceptable levels of service throughout its service area." *Virginia Cellular* at ¶ 23.

²⁸ *Virginia Cellular* at ¶ 30.

²⁹ June 4, 2002 Comments of Virginia Rural Telephone Companies in CC Docket 96-45 at 6 (emphasis supplied).

³⁰ *Id.* at 9.

³¹ *Id.* at 10 (emphasis supplied).

companies about *known wireless coverage difficulties* in their service territories, principally due to *mountainous terrain* blocking Virginia Cellular's signals.³² No such allegations of poor signal coverage or dropoffs have been made by any commenter in this proceeding, although the rural telephone companies in whose service areas Nextel Partners seeks designation are represented.

As a matter of fact, it is exceedingly unlikely that the same types of terrain blockage problems encountered in rural Virginia by Virginia Cellular would be an issue in Florida, a state that is largely flat, and lacks any significant terrain elevation. According to the World Atlas, the highest point in Florida, Walton County, is only 345 feet above sea level;³³ Accordingly (absent blockage by man-made structures), any wireless antenna mounted higher than 345 feet could theoretically have line-of-sight propagation (taking into account the curvature of the Earth) to virtually any point in Florida within range of its signal. This is an entirely different situation than faced by the petitioner in the *Virginia Cellular* case.

The Commission expressly stated that its newly-enunciated public interest "balancing test" is a "fact-specific exercise."³⁴ In the instant proceeding, however, no facts concerning potential service quality problems have even been *alleged* by any commenter, and the nature of Florida's terrain obviously precludes any possibility that Nextel Partners' signal will be blocked by mountainous terrain as contended by the rural

³² It should also be noted that Virginia Cellular operated an older type of *analog* service and had not yet converted its service to digital, but was in the process of upgrading its system. See *Virginia Cellular* at ¶ 19. This differs significantly from Nextel Partners' state-of-the-art and feature-rich wireless digital technology.

³³ See <http://www.worldatlas.com/webimage/countrys/namerica/usstates/fl.htm>

³⁴ *Virginia Cellular* at ¶ 13.

telephone companies in the *Virginia Cellular* case. Accordingly, despite FWA's strained attempt to imply a problem with Nextel Partners' coverage from the generic statements contained in footnote 8 of Nextel Partners' Petition, no "problem" with regard to service quality has even been alleged, and therefore no additional showing is required by Nextel Partners to "alleviate" a non-existent problem. Nextel Partners stands ready, however, to discuss issues of service quality in Florida with the FCC as required.³⁵

FWA's argument with respect to Nextel Partners' ability to provide service to its Designated Areas within a reasonable time is similarly unpersuasive.³⁶ FWA claims that Nextel Partners has exaggerated its coverage by submitting a map based on a three-watt handheld unit, and that Nextel Partners has not done anything to "insure that customers will in fact be provided service upon request."³⁷ A glance at Nextel Partners' coverage map, which is predicated on the use of a three-watt handset,³⁸ reveals that its *present* coverage far exceeds the boundaries of the rural telephone companies in whose service territories it seeks designation.³⁹ However, despite FWA's claims, it is not necessary for Nextel Partners to demonstrate in its Petition, or by its coverage map, that it *presently*

³⁵ TDS also raises the issue of service quality, alleging that Nextel Partners failed to "mitigate concerns about dropped calls." However, as noted above, no palpable concerns about dropped calls have been raised in this proceeding, unlike the situation in *Virginia Cellular*, and there is no independent reason to believe that Nextel Partners will have any difficulty whatsoever providing service to the very flat, low-lying terrain it serves in Florida. Imposing burdensome requirements to "mitigate" a concern that does not exist does not serve the public interest, and is inconsistent with the Commission's "fact-specific" approach.

³⁶ See FWA Comments at 10.

³⁷ *Id.*

³⁸ Although FWA correctly points out that most modern handsets use 0.6 watts of power, Nextel Partners does offer 3 watt handsets in addition to the lower-powered handsets.

³⁹ See *id.* at **Attachment 3**.

covers all of the areas in which it seeks designation as an ETC. As pointed out by the Commission in *Virginia Cellular*, and consistent with previously issued Commission decisions, “a telecommunications carrier’s inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.”⁴⁰ Nextel Partners made a specific commitment in its Petition to serve requesting consumers in Florida:

Upon designation as an ETC, Nextel Partners will respond to a “reasonable request” for service from customers throughout each of the Designated Areas (consisting of RTC study areas and specified wire centers of non-rural ILECs) set forth on **Attachment 1**.⁴¹

Nothing contended by FWA or any other Commenter in this proceeding has raised any substantive question about Nextel Partners’ willingness and technical ability to serve its requested Designated Areas. In fact, the only showing made in the proceeding is that Nextel Partners *already* serves all of the relevant areas, and this has not been contradicted by the submission of contrary proof by any Commenter. Nextel Partners stands ready, however, to discuss with the Commission its ability to respond to reasonable requests for service in its Designated Areas should the Commission have additional questions.

2. TDS’ Contentions

TDS’ attempts to show that Nextel Partners does not meet the public interest balancing test set forth in *Virginia Cellular* fall considerably short of controverting the showings set forth in Nextel Partners’ Petition. For example, TDS criticizes that, while Nextel Partners has stated that it provides a larger local calling area than rural ILECs, it has not “stated whether this larger calling area will be provided at rates comparable to the

⁴⁰ *Virginia Cellular* at ¶ 23.

⁴¹ Nextel Partners Petition at ¶ 11.

ILEC's local service rates.”⁴² TDS also claims severally that Nextel Partners has failed to explain the “benefits of mobile telephony,” and whether any PSAPs have requested GPS location assistance for 911 calls, or “whether the dilution of the ILECs’ universal service support would reduce the resources available” to the ILEC to make competitive improvements in response to Nextel Partners’ offering of supported services.⁴³ None of these showings, however, is required by applicable law, and TDS does not even attempt to cite to any rule or case that would require Nextel Partners to include such showings in its Petition. Nonetheless, TDS’ claims are both misplaced and incorrect.

With regard to the benefits of mobile technology, the record is clear: the Commission found in the *Virginia Cellular* decision that there is a public interest need for mobile technology and that *all* citizens, including those in rural areas, are entitled to the benefits brought by mobile phones. With regard to PSAP requests for GPS location assistance for 911 calls, Nextel Partners’ Petition stated the number of such Phase II requests Nextel Partners had received.⁴⁴ As for any “dilution of the ILECs’ universal service support,” TDS does not even attempt to provide any evidence of what “dilution” if any, might result from designation of Nextel Partners as an ETC in Florida. Moreover, TDS’ fear of legitimate competition from Nextel Partners certainly cannot support a public interest finding against grant of Nextel Partners’ Petition.

TDS also complains that Nextel Partners has not committed to comply with the CTIA Consumer Code, as did Virginia Cellular.⁴⁵ However, as discussed above, neither

⁴² TDS Comments at 9.

⁴³ *Id.*

⁴⁴ Nextel Petition at 3-4.

⁴⁵ *Id.* at 10.

Nextel Partners' quality of service, nor its willingness or technical ability to serve its Designated Areas, has been called into question by any Commenter in this proceeding, and unlike the situation in *Virginia Cellular*, it does not appear that any additional commitment is necessary to address perceived problems in coverage or quality. Nextel Partners reiterates that it will discuss with the Commission any questions the Commission may have concerning service quality or coverage.

3. Contentions of OPASTCO, NASUCA and Verizon

Aside from FWA and TDS, none of the other Commenters in this proceeding even attempts to dispute Nextel Partners' showing in its Petition that its designation as an ETC in the State of Florida will benefit the public interest. For example, NASUCA's comments do not address the merits of Nextel Partners' Petition for Designation, but are exclusively concerned with broader issues of national policy, such as the binding nature of subsequent rule changes,⁴⁶ the content of the "public interest test,"⁴⁷ and whether designation of multiple ETCs in a given RTC study area should be keyed to the amount of per-line support received by the incumbent.⁴⁸ In fact, NASUCA does not oppose Nextel Partners' designation as an ETC in Florida, but merely advocates the inclusion of additional requirements in the overall ETC designation process.⁴⁹

⁴⁶ NASUCA Comments at 2. *See also* Section D hereof, *infra*.

⁴⁷ NASUCA Comments at 2-3.

⁴⁸ NASUCA Comments at 3.

⁴⁹ Because NASUCA is in essence requesting the adoption of new rules, its request is more akin to a rulemaking proposal than a substantive comment that must be taken into account in the context of a designation proceeding for Nextel Partners, or for that matter, any particular ETC petitioner. In any event, to the extent that the additional requirements are made applicable to competitive ETCs, Nextel Partners will be bound by them, as will other ETCs. *See* the discussion contained in Section D hereof, *infra*.

Likewise, OPASTCO's comments are also almost exclusively concerned with overarching matters of national policy, and do not address the merits of Nextel Partners' application in any meaningful fashion. OPASTCO's assertion that Nextel Partners' petition has not made a proper public interest showing because it has failed to consider the "public costs" of granting high cost support to Nextel Partners is not persuasive.⁵⁰ OPASTCO has not provided any evidence that grant of Nextel Partners' Petition in this proceeding would result in any "public costs" or any other identifiable harm. While both OPASTCO and TDS assert that they are concerned about increasing the size of the USF fund,⁵¹ OPASTCO makes no attempt to show that grant of Nextel Partners' Petition will have any appreciable effect on the size of the fund. *See* Section C. hereof, *infra*.

Finally, Verizon does not address the merits of Nextel Partners' Petition, but only requests generally that all pending ETC petitions be held in abeyance pending the resolution of issues raised in the Joint Board's portability proceeding.⁵² Accordingly, the substance of Nextel Partners' showing in its Petition that its designation as an ETC in the State of Florida will benefit the public interest has not been challenged by any Commenter in this proceeding. Under the Commission's new public interest "balancing test" set forth in *Virginia Cellular*, Nextel Partners' Petition should be granted without further delay.⁵³

⁵⁰ *See* OPASTCO Comments at 5; TDS Comments at 7 (referring to OPASTCO's position).

⁵¹ *Id.* at 3.

⁵² *See* Verizon Comments at 1-2.

⁵³ Nextel Partners recognizes that, as a result of the Commission's decision in *Virginia Cellular*, ETC petitioners may be requested to make additional commitments with respect to their designations in rural study areas. It is to be anticipated, however, that any additional commitments will be consistent with the facts of a particular case.

C. The Policy Arguments Raised by the Commenters Are Beyond the Scope of this Proceeding, and Fail to Justify a Stay

This proceeding is solely concerned with the question of Nextel Partners' qualifications to be granted ETC status, and is not a general forum for the consideration of national policies regarding Universal Service. To the extent that the arguments raised by the Commenters seek to address larger questions of policy, they exceed the scope of this proceeding and cannot be addressed in the context of determining Nextel Partners' qualification for ETC status.⁵⁴

As can be seen by the foregoing discussion of FWA's public interest contentions, FWA essentially concedes that Nextel Partners' Petition meets not only the substantive criteria imposed by the Act for ETC designation, but also satisfies most of the elements of the public interest "balancing test" enunciated by the Commission in *Virginia Cellular*. Nevertheless, FWA persists in its insistence that the Commission should deny Nextel Partners' Petition – even if it meets the standards set forth in *Virginia Cellular* – on the basis that the Commission's analysis in that case was "incomplete" and needs to be shored up with additional burdensome requirements that, not coincidentally, might result in the denial of Nextel Partners' Petition. In essence, what FWA seeks is not the application of existing law, but *a change in existing law* that exceeds the scope of this proceeding, and is properly considered, if anywhere, in the context of a rulemaking. Without exception, each of FWA's "Additional Public Interest Analysis and Criteria" that

⁵⁴ See, e.g., *RCC Order* at ¶ 32 ("We recognize that these parties raise important issues regarding universal service high-cost support. We find, however, that these concerns are beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.")

FWA deems necessary in this case⁵⁵ is a requirement that exceeds what is currently contained in existing law and Commission policy. For example, FWA claims that Nextel Partners must independently demonstrate a “need for the funding.”⁵⁶ But this is not required by applicable law – and FWA’s laborious attempt to prove, based on an unspecified SEC report, that Nextel Partners does not “need” USF funding, is entirely irrelevant.⁵⁷ Similarly, FWA’s attempt to impose a strict time limit on serving all customers in a competitive ETC’s designated service territory exceeds the requirements of current law.⁵⁸ At base, the entire second half of FWA’s comments is a rulemaking proposal that cannot properly be considered in this proceeding.

OPASTCO, TDS and Verizon request that the Commission stay consideration of Nextel Partners’ Petition pending the resolution of policy issues that exceed the scope of this proceeding.⁵⁹ OPASTCO proposes that the Commission consider staying the instant proceeding pending resolution of high-cost support and other USF issues presently before the Federal-State Joint Board.⁶⁰ TDS is principally concerned that the Commission might

⁵⁵ See, e.g., FWA Comments at 11.

⁵⁶ *Id.*

⁵⁷ See FWA Comments at Attachment 2. Moreover, FWA’s attempt to “show” that Nextel Partners does not require USF funding is fundamentally flawed at a conceptual level. Although it is unclear where FWA obtained its figures, even the concept that an average per-line cost could be calculated in such a manner is fallacious. Moreover, even if an average per-line cost could be calculated, this still would say nothing meaningful about whether Nextel Partners “needs” support – since an average per-line cost would be system-wide, and would not take into account the far higher expense per line of serving less-dense rural and insular areas.

⁵⁸ See FWA Comments at 16.

⁵⁹ See OPASTCO Comments at 2; TDS Comments at 4-8; Verizon Comments at 1-2.

⁶⁰ See OPASTCO Comments at 2. OPASTCO claims that there is “precedent” for staying ETC designations, referring to a 1993 Order from the Commission that imposed an indexed cap on USF support for local exchange carriers on an interim basis. See

“pre-judge” the ongoing work of the Joint Board by processing pending ETC petitions.⁶¹

Verizon suggests that a stay is necessary to prevent additional ETC designations in non-rural areas from threatening the access charge framework established by the CALLS Order in CC Docket Nos. 96-262 and 94-1.⁶² In *Virginia Cellular*, the Commission rejected similar suggestions as unnecessary.⁶³

The possibility of a future change in rules generally affecting the designation of ETCs and/or the distribution of support from the USF cannot justify staying Nextel Partners’ request for designation as an ETC in Florida. The Commission is bound to abide by *existing* rules and policies in all proceedings.⁶⁴ The Commission has stated that it is informally committed to resolving ETC designation petitions in a six-month time frame, recognizing that “excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas.”⁶⁵ Staying the instant proceeding would “unnecessarily delay resolution of this

OPASTCO Comments at 4 n.10; *see also Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, 9 FCC Rcd 303 (1993). This assertion, however, is fatally flawed, since the cited case, which predates the 1996 Act, neither stays any Commission proceeding, nor affects the eligibility of any ETC applicant, but merely adjusts the funding for ILECs on a temporary basis.

⁶¹ TDS Comments at 3.

⁶² *See* Verizon Comments at 1-2.

⁶³ *Virginia Cellular* at ¶ 31.

⁶⁴ *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) (“Under the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.”).

⁶⁵ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264 (2000) (“*Twelfth Report and Order*”).

matter well beyond the Commission's informal [six month] commitment.”⁶⁶ Moreover, the proponents of a stay have failed to explain how delaying Nextel Partners' Petition could be justified in light of the Commission's recent action on Virginia Cellular's petition.

In response to TDS' stated concern, the Commission has already expressly determined that its processing of pending ETC petitions does not interfere with the workings of the Joint Board. As stated by the Commission in the *Virginia Cellular* Order:

We recognize that as part of its review of the ETC designation process in the pending proceeding examining the rules relating to high-cost support in competitive areas, the Commission may adopt a different framework for the public interest analysis of ETC applications. This Order does not prejudice the Joint Board's deliberations in that proceeding and any other public interest framework that the Commission may ultimately adopt.⁶⁷

OPASTCO raises the specter of imminent ballooning of the USF as grounds for a stay, asserting that if Nextel Partners is granted ETC designation in Florida, then all CMRS providers everywhere will seek and obtain ETC designation.⁶⁸ OPASTCO estimates that if all CMRS providers nationwide were to apply for and receive ETC status, the annual funding level of the High-Cost program would increase by approximately \$2 billion.”⁶⁹ However, OPASTCO provides no evidence demonstrating that all CMRS providers intend to be designated as ETCs.⁷⁰ In fact, there has been no

⁶⁶ See *RCC Order* at n.27.

⁶⁷ *Virginia Cellular* at ¶ 28.

⁶⁸ See OPASTCO Comments at 2-3.

⁶⁹ See OPASTCO Comments at 3.

⁷⁰ Nextel Partners' primary business focus is the provision of services in mid-sized and tertiary markets. This business focus makes Nextel Partners a natural and high-priority candidate for ETC designation. But not every CMRS carrier is interested in pursuing an

flood of wireline ETC petitioners and there is no reason to assume that wireless carriers will act differently by seeking to obtain ETC designation *en masse*.⁷¹

A review of the data reveals that it is the rural ILECs that are responsible for the growth of the fund. For example, in 2000, wireless ETCs received less than \$1.5 million in high cost support, whereas the rural LECs received almost \$2.03 billion in high cost support in that same year.⁷² Assuming a highly optimistic growth projection, wireless ETC funding is anticipated to rise to, at most, approximately \$102 million for 2003, compared to the approximately \$3.2 billion in high cost funding that rural LECs are anticipated to have received during the same time period.⁷³

Moreover, in developing support mechanisms, the Commission was aware that the USF would grow as competitive ETCs entered the market, and the Commission adopted mechanisms that would allow for adjustment over time.⁷⁴ The funding⁷⁵ and all

active course of providing the required services for ETC designation and building out a network in high-cost areas. There is no reason to believe that wireless ETCs pose any greater risk than wireline ETCs to the survival of the Universal Service Fund.

⁷¹ In fact, as recently established in the record of WT Docket 02-381 by the Universal Service Administrative Company, by the end of 2002, there were only 44 wireless competitive ETCs in operation, with only 29 receiving High Cost Program support. Total subsidies paid to these wireless ETCs for the provision of Universal Service supported services amounted to less than \$63 million for all categories of High Cost Support combined. See March 25, 2003 Letter and Attached Spreadsheet from Linda J. Miller, Deputy General Counsel of Universal Service Administrative Company in WT Docket 02-381.

⁷² See Reply Comments of CTIA, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (June 3, 2002) at 3.

⁷³ See *id.*

⁷⁴ See *MAG Order* at ¶ 11 (“The plan adopted today will provide certainty and stability for rural carriers for the next five years, enabling them to continue to provide supported services at affordable rates to American consumers. While we take an important step today on rural universal service reform, our task is not done. Our universal service rules cannot remain static in a dynamic marketplace. As we move forward, we will continue to refine our policies to preserve and advance universal service, consistent with the

of the core services⁷⁶ were discussed in length, reviewed by the Joint Board, reconsidered in the recent Order and Order on Reconsideration⁷⁷ and, in some cases, litigated.⁷⁸ In establishing the funding mechanisms, the Commission struck a balance between the concerns of all types of parties and carriers, including consideration of issues involving wireless ETC designation.⁷⁹ To prevent designation of competitive ETCs as the Commission moves into the implementation phase of these decisions is troubling at best, and antithetical to the underlying purposes of the Act.⁸⁰ After the ILECs fought to increase the amount of funding to support embedded costs,⁸¹ they are now using the size of the fund as an argument to prevent the entry of competitors.⁸² This position is

mandates in section 254.”); *see also In the Matter of Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 18 FCC Rcd 2932, ¶ 84 (2003) (wherein the Commission is already working to address anticipated future growth in the USF resulting from the entry of additional wireless ETCs during the next several years).

⁷⁵ *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20452, ¶ 90 (1999) (discussing support of second lines and the lines of non-ILEC ETCs).

⁷⁶ *See Competitive ETC Order at ¶ 7.*

⁷⁷ *Id.*

⁷⁸ *See, e.g., Alenco Communications.*

⁷⁹ *See MAG Order at ¶ 17* (“The Recommendation represents the consensus of individual Rural Task Force members, who work for a broad range of interested parties, often with competing interests, including rural telephone companies, competitive local exchange carriers, interexchange carriers, wireless providers, consumer advocates, and state and federal government agencies”), ¶ 178 (“All telecommunications carriers, including commercial mobile radio service (CMRS) carriers that provide supported services, regardless of the technology used, may be eligible to receive federal universal service support”), and ¶ 180 (“we adopt the Rural Task Force’s recommendation that a wireless mobile carrier use a customer’s location ... for purposes of receiving high-cost universal service support”).

⁸⁰ *See Alenco Communications at 619.*

⁸¹ *See MAG Order at ¶¶ 6-8.*

⁸² In non-rural study areas, the OPASTCO’s anticompetitive “ballooning” argument, which OPASTCO has attempted to cloak in the guise of a “public interest” concern over

disingenuous and does not warrant further delay of the grant of Nextel Partners' ETC designation. Moreover, designation of Nextel Partners as an ETC in Florida will not, in and of itself, undermine the viability of the USF.

D. Potential Future Rule Changes Cannot Justify Further Delay in the Grant of Nextel Partners' ETC Petition

NASUCA asks the Commission to ensure that ETCs comply with applicable rules that may be adopted in the future with regard to competitive ETC designation. As a practical matter, Nextel Partners and all other ETC petitioners must comply with Commission Orders. As noted above, there is no legitimate basis for holding ETC designation proceedings in abeyance pending the outcome of Commission proceedings that may or may not fully implement Joint Board recommendations. This was clearly recognized by the Commission in a recent Order in Docket 96-45, in which the Commission stated:

We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost universal service support in competitive areas could potentially impact, among other things, the support that competitive ETCs may receive in the future. *As such, we recognize that any grant of competitive ETC status pending completion of that proceeding will be subject to whatever rules are established in the future.* We intend to proceed as expeditiously as possible to address the important and comprehensive issues that are being raised.⁸³

In sum, none of the public policy arguments made by the Commenters in this proceeding has any bearing on the only relevant question at hand, which is whether

the size of the fund, is irrelevant since no separate public interest determination is required under the Act for non-rural study areas.

⁸³ *In the Matter of the Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 2003 FCC Lexis 3915 at ¶ 34 (emphasis supplied) (“*Competitive ETC Order*”). See also *Virginia Cellular* at ¶ 12.

Nextel Partners' Petition for Designation as an ETC in the State of Florida that is presently before the Commission should be granted.

Conclusion

For the reasons set forth above, Nextel Partners requests that the Commission promptly grant its Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida.

Respectfully submitted,

NPCR, Inc. d/b/a Nextel Partners

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Date: February 17, 2004

EXHIBIT 1

Map of Nextel Partners' Local Calling Area for the State of Florida

CERTIFICATE OF SERVICE

The undersigned, an attorney in the law firm of Catalano & Plache, PLLC hereby certifies that on this 17th day of February, 2004, a true and correct photocopy of the foregoing "Reply Comments" was sent via hand delivery to the following persons:

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